



SUBMISSION TO THE PRODUCTIVITY COMMISSION

ACCESS TO JUSTICE ARRANGEMENTS DRAFT REPORT

The Administrative Appeals Tribunal (AAT) welcomes this opportunity to make a further contribution to the Productivity Commission's Inquiry into Access to Justice Arrangements.

The AAT's submission on the Issues Paper set out a range of information about the AAT's role and its processes. This submission addresses the recommendations and information requests set out in the specific chapter on tribunals and also provides brief comments on some other matters covered in the report relevant to the AAT, namely:

- self-represented litigants;
- tribunal fees; and
- data and evaluation.

The AAT would be happy to provide any further information that would be of assistance to the Commission.

CHAPTER 10 TRIBUNALS

ALTERNATIVE DISPUTE RESOLUTION

Information Request 10.1

Given the contextual differences of the specific matters that tribunals seek to resolve, the Commission seeks feedback on how and where alternative dispute resolution processes might be better employed in tribunal settings, including in what types of disputes, to assist in timely and appropriate resolution.

The AAT supports the Commission's Draft Recommendation 8.1 that court and tribunal processes should continue to be reformed to facilitate the use of alternative dispute resolution (ADR) in appropriate cases. As the AAT noted in its submission on the Issues Paper, ADR is an integral part of the AAT's case management approach and is used in most types of applications. The use of ADR contributes in various ways to the achievement of the AAT's statutory objective to provide a mechanism of review that is fair, just, economical, informal and quick.

As the Commission notes, the critical issue is to ensure that the use of ADR is appropriate and will be effective and efficient within the broader context of the overall dispute resolution process. A range of considerations will be relevant, including:

- the nature and characteristics of the type of dispute, including the types of issues and the potential to reach agreement in relation to those issues
- the complexity of the issues that arise for resolution
- the capacity and availability of parties to participate in ADR
- the costs incurred by the court/tribunal and the parties in relation to the overall dispute resolution process and, in particular, costs that may be saved through the use of ADR.

The use of ADR to resolve disputes should be encouraged where it may lead to a faster and more cost effective resolution that is acceptable to the parties and enhances their satisfaction with the process.

The AAT agrees with the Commission that continuing work is required on evaluating the effectiveness of ADR processes, including how and when cases should be referred to ADR and the appropriate form of ADR. This will support sound decision-making in relation to the design of dispute resolution processes.

REPRESENTATION

Draft Recommendation 10.1

Restrictions on the use of legal representation in tribunals should be more rigorously applied. Guidelines should be developed to ensure that their application is consistent. Tribunals should be required to report on the frequency with which parties are granted leave to have legal representation.

Draft Recommendation 10.2

Legal and other professional representatives should be required to have an understanding about the nature of tribunal processes and assist tribunals in achieving objectives of being fair, just economical, informal and quick. Legislation should establish powers that enable tribunals to enforce this, including but not limited to tribunals being able to make costs orders against parties and their representatives that do not advance tribunal objectives.

As the AAT set out in its submission on the Issues Paper, parties in the AAT are entitled to be represented by another person.¹ Levels of representation vary significantly depending on the type of decision being reviewed. Representatives include lawyers, departmental staff, migration agents, tax agents, disability and veterans' advocates.

¹ Section 32 of the AAT Act.

The AAT's experience is that competent lawyers and other professional representatives contribute to the effective and efficient resolution of applications in a range of ways, including by:

- identifying and helping to narrow the real issues in dispute
- obtaining evidence relevant to the case, particularly where expert evidence is required
- helping to reach an agreed resolution, where possible
- presenting relevant evidence and submissions at a hearing.

Representatives of decision-makers play an important role in assisting the AAT to reach the correct or preferable decision, particularly in applications involving self-represented parties.

The AAT considers that the role representatives should be permitted to play in administrative review tribunal proceedings needs to be considered in the context of each tribunal. Relevant contextual factors will include:

- the tribunal's jurisdiction and its legislative and procedural framework
- the nature and complexity of the issues that arise for resolution
- the types of parties involved, including the extent to which applicants may have difficulty promoting their own interests and whether the government or other decision-maker participates in the review, and
- sources of assistance that are available for non-government parties.

Different approaches may be appropriate for different areas of jurisdiction within a tribunal. It may be appropriate to apply restrictions in some areas, including permitting representation by leave. The touchstone should be whether representation will contribute to fair, just and/or efficient review. Any restrictions should be applied consistently in accordance with clear guidelines.

The AAT notes that, regardless of whether representation is permitted, it is also essential that tribunals have in place practices and procedures that make it as easy as possible for a self-represented party to participate as fully as possible in a proceeding.

Consistent with the general proposition that data relating to the operation of the civil justice system should be improved, the AAT agrees it would be desirable to collect and make available better data relating to representation. This should be done in accordance with agreed protocols and without imposing any significant additional administrative burden.

The AAT believes that, in its operational context, it is appropriate that parties can be represented by a lawyer or professional representative if they so choose. However, there are a range of measures that could be introduced to help ensure that legal and other representatives act in a way that promotes rather than hinders fair, just, economical, informal and quick review.

The AAT supports Draft Recommendation 10.2. Legal and other professional representatives should be required to have an understanding of tribunal processes if they undertake work of that kind. Tribunals can assist in this regard by making available high-quality resources that clearly outline their procedures and expectations and offering regular seminars for representatives about tribunal processes which could contribute to meeting continuing professional development obligations.

Representatives should also be required to assist tribunals to achieve the objectives of being fair, just economical, informal and quick. Legislation governing the operation of a tribunal should impose a specific obligation on both parties and representatives to act in a manner that is consistent with those objectives and empower a tribunal to limit the involvement of representatives who do not act appropriately. This obligation must also be supported by legislative provisions that promote a tribunal's capacity for active case management, including the power to determine the scope of the review, evidence that may be submitted (particularly expert evidence) and how the review will be conducted.

As the AAT suggested in its submission on the Issues Paper, provisions of the kind set out in Part VB of the *Federal Court of Australia Act 1976* provide a model that could be adapted.² The AAT also notes that some of the more general recommendations relating to improvements to court case processes set out in Chapter 11 of the Draft Report could be extended, where relevant, to tribunals dealing with similar issues.

In relation to using costs orders to regulate the behaviour of parties and representatives, there are constitutional limitations on empowering Commonwealth administrative review tribunals to make such orders. However, to the extent that power to make orders against a party's representative in circumstances where there has been unreasonable behaviour can be conferred, the AAT supports their availability.

For all types of professional representatives, the AAT considers there would be value in reviewing regulatory frameworks and guidance material to ensure they deal with involvement in tribunal proceedings. In addition to requiring a representative to have an understanding of tribunal processes, frameworks need to address issues such as:

- conflicts of interest in tribunal proceedings: for example, circumstances in which the representative's actions may have contributed to the making of an adverse decision in relation to which review is sought, an issue which has arisen in the AAT
- appropriate conduct in dealing with the tribunal and its requirements.

Strengthening regulatory frameworks would help to promote high-quality representation generally and would also facilitate the referral of a representative to the relevant regulatory authority in cases where the tribunal considers there has been inappropriate conduct. This is particularly important given administrative tribunals have limited ability to use costs orders as a tool for regulating behaviour.

² See sections 37M, 37N and 37P of the *Federal Court of Australia Act 1976*.

As the AAT noted in its submission on the Issues Paper, the AAT Act specifies that decision-makers must use their best endeavours to assist the AAT to make its decision in relation to the proceeding before it.³ This is an important requirement that reflects the particular role of a decision-maker in administrative review proceedings. It is also referred to specifically in the model litigant obligations that apply to Australian Government department and agencies.⁴ The requirement encompasses matters such as making information easily available to the AAT, avoiding delays, presenting new material where relevant and providing specialist evidence when it may assist.⁵

The AAT supports Draft Recommendation 12.2 that Commonwealth, state and territory governments and their agencies should be subject to model litigant guidelines that are strictly monitored and enforced. The Commission has also asked for feedback on whether model litigant requirements should also apply in cases where there is a disparity in resources between the parties to litigation such as in matters involving large corporations or where a party opposes a self-represented litigant.

In addition to reviewing decisions made by Australian Government departments and agencies, the AAT reviews decisions made by, or on behalf of, private companies in relation to workers' compensation entitlements under the *Safety, Rehabilitation and Compensation Act 1988* and the *Seafarers Rehabilitation and Compensation Act 1992*. In his review of the Safety, Rehabilitation and Compensation Act undertaken in 2012–13, Peter Hanks QC recommended that private companies licensed under the Comcare scheme be required to follow the model litigant requirements set out in the *Legal Services Directions 2005*.⁶ In a review of the Seafarers Rehabilitation and Compensation Act which was also undertaken in 2012–13, this approach was not supported for companies covered by that scheme.⁷

All decision-makers, whether the government or the private sector, are subject to the statutory requirement to assist the AAT in making its decision. If that requirement were supplemented by a broader provision of the kind suggested above imposing an obligation on all parties and representatives to assist the tribunal to meet its statutory objectives, many aspects of the obligations found in model litigant rules would appear to be covered. However, to the extent that model litigant guidelines that are appropriate to apply beyond government decision-makers may be broader or articulate obligations more clearly, consideration could be given to extending their application to all decision-makers in administrative review tribunals.

³ Section 33(1AA) of the AAT Act.

⁴ Sections 3 and 4 of Appendix B to the [Legal Services Directions 2005](#).

⁵ Attorney-General's Department 2010, *Guidance Note No 1: The Administrative Appeals Tribunal Act 1975: Obligation to assist the Tribunal*, viewed 4 July 2014
<<http://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Documents/Administrative%20Appeals%20Tribunal%20Act%201975%20obligation%20to%20assist%20the%20tribunal.pdf>>

⁶ Hanks P, *Safety, Rehabilitation and Compensation Act Review*, viewed 4 July 2014
<http://docs.employment.gov.au/system/files/doc/other/src_act_review_report.pdf> at 174–6.

⁷ Stewart-Crompton R, *Review of the Seacare Scheme*, viewed 4 July 2014,
<http://docs.employment.gov.au/system/files/doc/other/review_of_the_seacare_scheme_report.pdf> at 176.

TECHNOLOGY

Information Request 10.2

Due to the varying degrees to which tribunals have implemented information and communication technologies, the Commission seeks further information on the extent to which such technologies are used in tribunals, and on the experiences of tribunals that have implemented them.

The AAT uses a variety of technologies to deliver its services to users. Some of the key technologies are described here.

The AAT's website contains a range of information about the AAT, its role and its jurisdiction, how to apply, steps in the review process and how to appeal a decision. Information products have been developed for self-represented parties and for representatives, and brochures are available in a range of languages and large print format. The AAT is also in the process of implementing ReadSpeaker, a service enabling the text on a webpage or in a document on the website to be read aloud which will improve accessibility for users with cognitive and learning difficulties, mild visual impairment and English as a second language.

The AAT has an electronic case management system which contains all details relating to applications lodged with the AAT. It is used to list case events, generate case-related documents and emails, monitor the progress of cases and report on performance. The case management system is the source of data for the AAT's online case search facility which was launched in March 2013. Accessible 24 hours a day, eCase Search allows parties, their representatives and the public to search for, and access, select information about most AAT applications. Parties and representatives can check the date and time of the next listing in their case or whether another party has lodged a particular document without needing to contact a registry.

As the AAT noted in its submission on the Issues Paper, the AAT makes extensive use of the telephone to conduct case events which leads to time and cost savings for the parties. Where both parties are represented, conferences are usually held by telephone. Conferences are also conducted by telephone with self-represented parties where attendance at the AAT's premises would not be convenient for geographic or other reasons, or the self-represented party expresses a preference to participate by telephone. Most directions hearings are held by telephone.

While the AAT generally prefers to conduct more formal ADR processes and hearings face-to-face, they are conducted by telephone where it is considered appropriate, particularly where attendance at the AAT's premises would not be convenient. Witnesses routinely give evidence by telephone and this has become the usual way in which experts give evidence in some registries.

Videoconferencing is used to conduct case events or parts of case events, including for hearings where the AAT member and one or more of the parties may be in different registries. Videoconferencing is likely to be used more frequently for conferencing and other ADR events in applications for review of decisions under the National Disability Insurance Scheme (NDIS). The AAT has established arrangements with venues in a number of the trial sites to facilitate the use of videoconferencing where this would be an appropriate option for applicants. The AAT is currently investigating options for the use of web-based videoconferencing which will provide an enhanced level of service for its users.

The AAT uses SMS to send reminder messages to self-represented parties about approaching case events. It is also used to instigate contact or leave a message where the AAT has been unable to reach a person by other means. The AAT also makes extensive use of email for the exchange of documents with parties throughout the review process.

The AAT is committed to providing accessible and effective services to parties and the public, which includes developing online service options. The AAT has adopted a strategy for the implementation over time of a suite of integrated systems to deliver online services and manage information electronically, including online applications, electronic lodgement and exchange of documents, an electronic file and enhanced online access to documents and other information relating to a case. These systems will improve the efficiency of the review process and provide parties and representatives with a range of options for engaging with the AAT and each other.

There are a range of challenges, however, to the adoption of appropriate technology solutions. Availability of resources is an issue and the AAT considers there would be benefits in shared approaches to technology solutions across courts and tribunals. The amalgamation of the AAT with the Migration Review Tribunal-Refugee Review Tribunal (MRT-RRT), Social Security Appeals Tribunal (SSAT) and Classification Review Board offers clear opportunities to adopt technology solutions that can deliver more efficient and effective processes. In the particular context of the AAT, the variety of systems used by decision-making agencies and organisations may present some challenges in relation to the alignment and integration of systems. This issue will require careful analysis and consultation.

RESTRUCTURING

Information Request 10.3

The Commission seeks views on the cost-effectiveness of consolidating all Commonwealth merits review bodies in one Administrative Review Tribunal along the lines recommended by the Administrative Review Council.

Information Request 10.4

Where consolidation of tribunals is not feasible, the Commission seeks views on options for greater use of co-location, shared administration and shared outreach.

Information Request 10.5

The Commission seeks views on whether current appeal and review mechanisms within and between tribunals, and between tribunals and courts, are operating fairly, efficiently and effectively, and what opportunities exist for rationalisation or improvement.

As noted above, the Government announced in May 2014 that the AAT will be amalgamated with the MRT-RRT, SSAT and the Classification Review Board with effect from 1 July 2015. The Government also announced that merits review of Freedom of Information matters, currently undertaken by the Office of the Australian Information Commissioner, will be transferred to the AAT from 1 January 2015. Issues of the kind referred to here will be considered as part of the amalgamation.

TIMELINESS OF REVIEW

Figure 10.5 on page 310 of the Draft Report identifies the time taken by various tribunals to finalise at least 50 per cent of their cases in 2011–12. The figure acknowledges the AAT as one of the tribunals that does not make this statistic available but includes an entry which suggests that the AAT takes 12 months to reach this point. The time to finalise 50 per cent of the applications completed in 2011–12 was 6 months.

CHAPTER 14 SELF-REPRESENTED LITIGANTS

The AAT supports the Commission's Draft Recommendation 14.1 that courts and tribunals should take action to assist users, including self-represented litigants, to clearly understand how to bring their case. Training and information resources should also be made available in relation to assisting self-represented parties.

The AAT noted in its submission on the Commission's Issues Paper that, while levels of representation vary according to the type of decision that is being reviewed, a significant proportion of individuals who are parties to applications at the AAT are self-represented or do not otherwise have professional representation. In 2012–13, the overall figure was 50 per cent. In relation to the review of Centrelink decisions, 84 per cent of individuals did not have professional representation.

The AAT outlined in its submission various ways in which self-represented parties are assisted both to access the AAT and to participate in the review process. These include:

- straightforward requirements for making a written application
- plain English information about apply for review and about each of the key steps in a review
- telephone contact with AAT staff members throughout the review to talk about the AAT's processes and SMS reminders about upcoming case events
- making interpreters available free of charge and using technology to facilitate communication.

Significantly, in addition to procedural assistance, the AAT's processes also enable it to assist self-represented parties in relation to the substantive issues that are in dispute. These include:

- conferences at which both the procedural and substantive issues relating to the application are discussed, including the kind of evidence a self-represented party needs to support his or her case and how that material may be obtained
- hearing processes that respond to the needs of self-represented parties and help to facilitate the receipt of relevant evidence, including adjourning where appropriate so that additional evidence can be obtained.

The procedural assistance that the AAT provides help to ensure self-represented parties have all the information and help to enable them to participate as fully as possible in the process. The AAT's approach in relation to the substantive issues is consistent with its role as an administrative decision-maker that must make the correct or preferable decision on review. The AAT will seek to ensure that, as far as possible, relevant material is available to consider. Providing self-represented applicants with assistance that helps them to understand and present their best case contributes to the fairness and justice of the review process.

However, there are limits on the extent to which the AAT's members and staff can assist self-represented parties, particularly in relation to substantive issues. Firstly, the AAT must act fairly in its dealing with all of the parties, an issue which arises more acutely for the member(s) hearing and deciding a case. The AAT must be careful to ensure it does not assist a party to a degree that raises concerns about its impartiality. Secondly, the AAT does not have the resources to obtain all evidence that it considers would be of assistance in determining a particular case. While the AAT may request that a decision-maker obtain certain evidence, issue a summons for certain documents in appropriate circumstances or otherwise seek relevant material, there is evidence that a self-represented party would have to obtain themselves to be taken into account. There may be a range of barriers to obtaining this evidence. Thirdly, AAT members and staff are not performing the role of a representative nor providing the advice and services that a representative can offer.

In its submission on the Commission's Issues Paper, the AAT noted that it has established legal advice schemes with the cooperation of legal aid bodies in most registries. A legal aid solicitor generally attends the AAT once each week or each fortnight. The AAT invites self-represented parties to make an appointment to see a solicitor who can provide advice and minor assistance, mostly in social security cases and occasionally in other types of cases. The appointments are generally held early in the review process. Further assistance, such as representation, may be provided if a person makes a successful application for legal aid. The AAT may also refer self-represented parties to community legal centres and other legal service providers that may be able to provide advice or representation.

In relation to the AAT's NDIS jurisdiction, the Australian Government has funded a disability advocacy service in each of the NDIS trial sites to provide assistance people who apply for review of NDIS decisions. A support person can help an applicant understand the AAT process, attend conferences and hearings with the applicant, and assist the applicant put their case to the AAT. Limited funding is also available for legal aid bodies to provide representation in cases where novel or complex issues are raised.

The AAT's experience is that the legal advice schemes and the other arrangements noted are valuable sources of additional assistance for self-represented parties in relation to the review process.

The Commission has referred in Chapters 14 and 19 to the potential for self-represented parties to be assisted through unbundled legal services. The AAT considers that self-represented parties in a range of jurisdictions could benefit from the wider availability of unbundled services of the kind described in the Draft Report both in the private market and through services attracting some public funding such as QPILCH's Self-Representation Service, particularly for discrete task assistance such as gathering more complex types of evidence. These could form part of a variety of options for external assistance to which the AAT could refer parties in appropriate cases and which would complement the AAT's own processes for assisting self-represented parties.

CHAPTER 16 COURT AND TRIBUNAL FEES

As the AAT set out in its submission on the Commission's Issues Paper, an application fee is payable at the AAT only for certain types of applications. Where it is payable, the standard application fee is \$861 and the application fee for an application lodged in the Small Taxation Claims Tribunal is \$85. As set out in the AAT Regulations, these two fees are revised every two years to take into account changes in the Consumer Price Index.⁸

⁸ Regulations 19A and 19B of the AAT Regulations.

Many applicants are exempt from paying a fee or are eligible to pay a reduced fee. For example, applications in the NDIS, social security, veterans' entitlements and workers' compensation jurisdictions are fee exempt.⁹ The standard application fee can be reduced to \$100 if:

- the applicant has been granted legal aid, holds a health care card or other card that certifies entitlement to Commonwealth health concessions, is in prison or otherwise lawfully detained, is under 18 years of age or is receiving youth allowance, Austudy payment or ABSTUDY benefits; or
- the AAT is satisfied that paying the full fee would cause the applicant financial hardship.¹⁰

Where an application fee is payable, the application cannot proceed until the fee is paid. The AAT may dismiss an application if the application fee is not paid within six weeks of lodging an application.¹¹

At the conclusion of an application, if the AAT certifies that the proceedings terminated in a manner favourable to an applicant who paid a standard application fee, the person is entitled to a partial refund (i.e. the standard application fee less \$100).¹²

The circumstances in which fees are payable in relation to applications to the AAT, including when no fee or a reduced fee is payable, and when fees may be refunded are a matter of policy for Government. In considering the appropriate framework that should apply, the AAT considers that the nature of the role performed by administrative review tribunals and how they differ from courts needs to be taken account. Careful consideration must also be given to the range of persons who can be involved in administrative review proceedings and the types of decisions that are reviewed. Fee arrangements should not undermine access to administrative justice.

The AAT supports the continued use of defined categories of users who are automatically entitled to fee relief as currently exists in the AAT and the Commonwealth courts. This is a simple method of establishing eligibility for appropriate classes of users. In relation to the residual discretion to provide fee relief where payment of a fee would cause financial hardship, the AAT supports the development of a common set of criteria that can be applied across Commonwealth courts and tribunals to provide greater clarity for parties and support consistent decision-making. The AAT also agrees that, in determining the appropriate framework for fees where it is decided they are appropriate, consideration needs to be given to the costs associated with administering the arrangements.

⁹ The decisions in relation to which no fee is payable are set out in regulation 19(2) and Schedule 3 to the AAT Regulations.

¹⁰ Regulations 19(6) and (6A) and 19AA(6) and (6B) of the AAT Regulations,

¹¹ Section 69C of the AAT Act and regulations 19(6D) and 19AA(6E) of the AAT Regulations.

¹² Regulations 19(8) and (9) and 19AA(8) and (9). For more information about the AAT's application fees and refunds, see the [AAT website](#).

CHAPTER 24 DATA AND EVALUATION

The AAT supports the Commission's Draft Recommendation 24.1 that governments work together with the legal services sector to develop and implement reforms to collect and report data. The AAT is an active participant in the work being undertaken by the Attorney-General's Department Civil Justice Evidence Base Project to provide a framework for the collection of a consistent set of a data in the federal jurisdiction. The development of a common set of definitions, measures and collection protocols will assist in improving data over time. It is also essential, however, to consider the legal and privacy issues relating to the collection of data and the resource implications of collecting better data, including making necessary changes to systems.